



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO 179 OF 2013**

**MORGAN AIR CARGO LIMITED.....PLAINTIFF**

**VERSUS**

**EVEREST ENTERPRISES LIMITED.....DEFENDANT**

**RULING**

**Review application**

[1] The Plaintiff applied through application dated 8<sup>th</sup> December 2014 for the following prayers;

1. ***THAT the Honourable Court be pleased to review and/or vary its ruling and order given on the 18<sup>th</sup> day of September 2014.***
2. ***THAT in the alternative, the Honourable Court be pleased to correct and/or rectify its ruling and order given 18<sup>th</sup> September 2014 to accord with its determination of issues identified for determination.***
3. ***THAT the Honourable Court be pleased to reconsider the submissions of the parties and make a ruling on the issues whether interest is payable to the Plaintiff/Applicant at court rates as per the consent recorded in court by the parties.***
4. ***THAT the Honourable Court be pleased to grant interest to the Plaintiff/Applicant on the consent amount as prayed in the Plaintiff.***
5. ***THAT the costs of this suit be provided for.***

[2] The application was brought pursuant to the provisions of Order 45 Rule 1 & 2 and Order 51 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 80 of the Civil Procedure Act. It is premised on the grounds that: the ruling abovementioned had an error apparent on the face of the record; no appeal had been proffered against the said ruling; and it would be in the interest of justice for the ruling to be reviewed to reflect the actuality of the filed submissions and the consent of the parties recorded in court. The application was further supported by the affidavit of David Muthee Michuki sworn on 8<sup>th</sup> December 2014 which restated the grounds cited in the application, except it deposed further that no prejudice will be occasioned on the Defendant.

[3] According to the Plaintiff's submissions dated 5<sup>th</sup> February 2015 and filed on 6<sup>th</sup> February 2015, here is an error apparent on the face of the record as defined in **Geoffrey Mwaniki Mwinzi v Ibero (Kenya) Limited & Another (2014) eKLR**, which grants this court the jurisdiction and the power to correct, amend and/or review its ruling under Section 80 of the Civil Procedure Act. They also cited the case of **Pancras T Swai v Kenya Breweries Limited (2014) eKLR**. The Plaintiff submitted that the

Honourable Court had identified the question of interest as an issue for determination, but the court did not address the issue of interest in its ruling which is an error apparent on the face of the record. It was further submitted that the court had the jurisdiction to award interest under Sections 26 and 27 of the Civil Procedure Act. To buttress its contention, the Plaintiff relied on the case of **Orix Oil (Kenya) Limited v PualKabeu & 2 Others (2014) eKLR** and *Judicial Hints on Civil Procedure Vol. 1 (1984)*.

[4] The application was unopposed. However, the court allowed the Defendant to file and rely on its submissions on the issue of interest. The award of costs by this court is not contested and the Defendant conceded to that fact. In its submissions dated 2<sup>nd</sup> March 2015, the Defendant submitted that, interest is discretionary under Section 26(1) of the Civil Procedure Act. Therefore, the Court was not under compulsion in strict terms under the said provision to award interest. Thus, contrary to the submissions by the Plaintiff, the issue of interest was not an error apparent on the face of the record. They relied upon the case on **Nyamongo & Nyamongo Advocates v Kogo [2001] EA 173**. It was submitted further that the right forum to litigate the issue of interest would be the Court of Appeal, and this court through review process. To them, the course taken is a misdirection of the law.

### DETERMINATION

[5] Before I determine the merits or otherwise of the application for review, I should consult the decision of the Supreme Court of India in **P. N. EswaraIyer v The Registrar 1980 AIR 808; 1980 SCR (2) 889**, where it was held *inter alia* that;

*“A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and over-ruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in the conservation of judicial time for maximum use. We regret to say that this case is typical of the unfortunate but frequent phenomenon of repeat performance with the review label as passport. Nothing which we did not hear then has been heard now except a couple of rulings on points earlier put forward. Maybe, as counsel now urges and then pressed, our order refusing special leave was capable of a different course. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality.”*

[6] I now revert to the instant application by the Plaintiff. Reliance was placed on Section 80 of the Civil Procedure Act and Order 45 Rules 1 & 2 of the Civil Procedure Act as the substantive and procedural law on review. They also relied on the provisions of Section 26(1) and 27 of the Civil Procedure Act on the contention that they were entitled to an award for interest. The court was clear in its ruling that, whereas the issues of costs and interest were raised, the Plaintiff's submissions were only on the issue of costs. It was, however, noted that the Defendant had submitted on interest, and as such the Court would take cognizance of the issue. The issue of costs was conclusively determined, and both parties were contented. The point of contention now is with regards to the perceived failure by the court to award interest. It is worth of note that the determination of 18<sup>th</sup> September 2014 by this Court was as a result of a disagreement between the parties on costs and interest in a consent agreement herein. Under Clause C (v) of the recorded consent, it was onerous and encumbered upon the parties to agree on costs and interest. The court determined that the Plaintiff was entitled to costs. The issues had been effectually and effectively determined in consideration of the facts and evidence adduced before the Court, and in light of the overriding objective as enunciated under Sections 1A and 1B of the Civil Procedure Act.

[7] What about the provisions of Section 26(1) of the Civil Procedure Act? The said provision reads;

***Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.*** (Emphasis added).

Section 27(1) on interest on costs provides that;

***The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.*** (Emphasis added).

[8] The operative word in both these provisions is “*may*” which means that the court has the discretion whether or not, in consideration of the circumstances of the case, to award interest or not. It is settled that discretionary powers wielded by the court should be exercised cautiously, judicially and in the interest of justice. The court under the aforementioned provisions of Section 26(1) and 27(2) of the Civil Procedure Act has the discretion to award interest on the principal sum from the time of filing suit or even at an earlier time. The court also has discretion to award interest on costs. Therefore, under the two sections, I can safely state that the court has discretion to award interest on the decretal sum. Therefore, where a court has not exercised discretion at all on a matter which was before it for determination or where it did not make a determination of any matter before it, there is justification to lean toward review of the decision in question in a manner and to the extent that serves justice. Such review should be aimed at removing the glaring omission in the decision of the court under the ground of error apparent in the face of the record in accordance with Section 80 and Order 45 of the Civil Procedure Act and Civil Procedure Rules respectively.

[9] In this case, despite the fact that the Plaintiff did not submit on interest-and this is highly regrettable- the matter fell for determination as an issue on two fronts; by the consent of parties the court was to determine the issues of costs and interest following failure by the parties to agree on the two issues; and secondly, with the said reference by parties, the court set out the issue of interest as one of the issues for determination. The court inadvertently did not determine the issue of interest and this is glaring on the face of the ruling it delivered. I do not think the omission is an erroneous conclusion of law or evidence at all which would disentitle the court of exercise of jurisdiction of review in the sense of the parting shot by the Court of Appeal case of **Francis Origo & Another v Jacob Kumali Munagala [2005] eKLR**, where it stated that;

***“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction.”***

[10] In a case such as the one before me, a party may appeal or seek review of the judgment or ruling of the court under section 80 of the Civil Procedure Act. I do not, therefore, agree with the submission by the Defendant that appeal is the only option in this case. I also do not agree with their submission that the omission is not an error apparent on the face of the record. It is and plainly discernible as such error within the sense of order 45 of the Civil Procedure Rules. See Black’s Law dictionary, Ninth Edition at pg. 622 on definition of “error apparent”;

***“An error that is so apparent and prejudicial that an appellant court should address it despite the parties’ failure to raise a proper objection at trial. A plain error is often said to be so obvious and substantial that failure to correct it would infringe a party’s due process rights and damage the integrity of the judicial process.”***

[11] The constitutional yardstick is, therefore, this; that failure to correct the error herein would infringe a party's due process rights and damage the integrity of the judicial process. A review of the ruling of this court cannot, therefore, be said to be "unwarranted second chance to the Plaintiff" as the issue on interest was never determined by the court. It is, in my view, a deserved legal opportunity to ensure the rights of the Plaintiff are not suppressed by an omission which occurred inadvertently on the part of the court. Accordingly there is every justification for this court to award interest on the principal sum as well as costs. The interest on the principal sum will be from the date of filing suit until payment in full. This is on the basis that the claim was for a liquidated demand and the plaintiff had been deprived of the benefit of the said sum by the Defendant. As for interest on costs, it will be from the date of assessment of costs until payment in full. The interest on both the principal sum and costs shall be at 12% p.a. The ruling delivered on 18<sup>th</sup> September, 2014 is accordingly reviewed to the extent afore-stated. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 28<sup>th</sup> day of May 2015.**

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**F. GIKONYO**

**JUDGE**